Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYNN ATHMANN, JEFF DEUTSCH,
MICHAEL DONOVAN, ROBERT KROGSENG,
JAMES LOMER, MICHAEL McCARTHY,
SAMUEL DAVID REAL, TIM ROUTEN,
ANDREW TOOYAK, JR., and HANNS WEISS,

Petitioners,

vs.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether when an employer's payroll records and time sheets are concededly false and inaccurate, the plaintiff police officer estimates of uncompensated overtime work were sufficient to shift the burden of proof under *Mt. Clemens*.

2. Whether a flextime system which requires nonconsecutive hours of work that are performed at unscheduled and indeterminate time periods over 24 hours, 7 days a week to be offset by undetermined hours of non-activity at some unscheduled and intermittent time periods in the future is inimicable to the broadly remedial and humanitarian purposes of the Fair Labor Standards Act.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following plaintiffs were parties below: Roy Ruffino, Marlin "Duke" Circle, Daniel Nelson, Dan Shirey, William Earwood, Rick Swanson, and Jerald MacFarland.

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OPINIONS BELOW

On June 27, 1992, the United States District Court for the District of Alaska after jury trial, issued a Judgment dismissing claims of plaintiff police officers for unpaid overtime and wages brought against the North Slope Borough of the State of Alaska. A copy is printed in Appendix A, pp. 1 - 2. An Amended Judgment and Order was entered November 18, 1992. A copy is printed in Appendix B, pp. 3 - 4. The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision on May 23, 1994. The decision was not published and is reproduced in Appendix C, pp. 5 - 20.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 23, 1994. A Petition for Rehearing to the Ninth Circuit was denied on June 29, 1994. This Petition for Writ of Certiorari is filed within ninety days of the denial of the Petition for Rehearing. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and U.S. Supreme Court Rule 10.1(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Since the statutory provisions involved are lengthy, the citations alone are set forth below. The pertinent text is set forth in Appendix D, pp. 21 - 29.

United States Code

Fair Labor Standards Act
29 U.S.C. § 207(a) and (k)
29 U.S.C. § 211(c)
29 U.S.C. § 216(b)

Code of Federal Regulations

29 C.F.R. § 516.2

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F.R.C.P. Rule 59

STATEMENT OF THE CASE

A. The Claim.

Seventeen police officers brought this action against the North Slope Borough ("NSB") asserting violations of the Fair Labor Standards Act of 1938 ("FLSA").[1] The officers demanded unpaid overtime resulting from their assignment to the seven remote villages of NSB to provide a 24 hour police presence in those villages. See Map, App. E. Often the officer was the sole NSB officer for periods of 3 to 14 months.

Officers prosecuted claims for unpaid overtime under two alternative theories. See 29 U.S.C. § 207(a), 211(c), and 216(b). First, each officer estimated hours worked and unpaid due to an unlawful flextime schedule employed by NSB. Second, each officer alleged a claim based upon uncompensated "on call" time. This petition relates only to the first claim based upon the officer's estimate of uncompensated overtime hours for extra hours of work "stretched" over 24 hour days and 7 days a week by NSB's novel and unprecedented "flextime" policy.

B. The Plaintiffs

The police officers came to NSB with varying degrees of experience. Some officers had as much as 10 years of law enforcement experience in police departments of other states and had received commendations for heroism. Reporter's Transcript **"RT" V 86; RT II 117**. Others were fresh recruits out of college. One officer was a

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[1] Of the original 17 only 10 join in this Petition.

young female who had always wanted a career in law enforcement. **RT VII 17**. She chose to work for NSB over a job offer with the Tacoma police department. *Id.* at 20. One plaintiff was an Alaska Native, born and raised in the NSB village of Point Hope. **RT II 250**. Another officer came to NSB with 22 years of experience as an Air Force pilot, attaining the rank of major with distinguished and decorated service in Vietnam. **RT IV 217.**

C. The Benefit to NSB in Contracting for 24-Hour Police Presence.

The populations of NSB villages range from as little as 100 to as much as 500-600 residents. As the result of the experience of alcohol-related violence, village residents became dependent on and demanded a constant law enforcement presence to preserve the peace. **RT V 170**. The village residents wanted it and it was the desire of NSB to provide that service. **RT II 113**. NSB's mayor emphasized provision of 24-hour police service to the villages as part of his administration.[2] **RT VII 87.**

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[2] NSB enjoys a strong financial depth due to annual revenue from taxation based on oil reserves of $250-300 million. Exhibit **("Ex.") 152-55**. NSB is a home rule municipality the size of the State of Montana, which is located in the far north section of Alaska. See App. E. It is Alaska's wealthiest local government with a tax base including the North Slope oil fields and northern section of the Trans-Alaska Pipeline assessed at more than $12 billion. The mayor of NSB testified that in the years 1987 through 1990, the budget reserves of the NSB were in excess of $100,000,000 for each of those calendar

(continued...)

When it is understood that these seven villages are scattered across the entire North Slope (See Map App. E), police protection provided only by long distance from Barrow was unsatisfactory. According to the Director of Public Safety, each officer was assigned to a village to become the "chief of police" of the village. The officers were engaged to take care of anything that arose in the village and "keep the peace."[3] **RT VI 265, 269**.

Even the most quiet NSB village can become extremely violent with the introduction of alcohol. Each of the officers testified to personal experiences with the

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[2](...continued)
fiscal years. **RT VII 91; Ex. 220.** During those same budget years, the Department of Public Safety budget for all operations in Barrow and the villages ranged between $4,500,000 and $5,500,000. *Id.* With such numbers, NSB could afford the expenditures of monies needed to assign police personnel to permanent village assignments.

[3] The deputy director of the NSB Department of Public Safety also testified that it was the policy of NSB to provide 24-hour law enforcement service to village residents of the Borough and that village residents deserved and expected such service from the Borough. **RT V 182** and **164-A**. Despite this goal, each of the officers often served as the sole law enforcement representative of NSB in the villages for significant periods of time. (Officer Krogseng spent 21 two week payroll periods alone in village assignment) **RT IV 234; Ex. 59**, (Officer Tooyak, 31 two week payroll periods alone). **RT III 151-152; Ex. 156**.

sometimes violent and explosive situations resulting from alcohol or drug abuse. Officer Lomer recounted the experience of having shots fired at his house, causing him to direct his wife, 5 months pregnant, and her cousin, who was also pregnant, to lie on the floor to stay out of the line of fire. **RT VI 137-139**. Officer Swanson testified to having a .44 magnum pointed at his head and being told "You're going to die." **RT IV 130-131**. Officer Athmann testified about her experiences entering buildings where drunk and agitated residents were either threatening to commit a crime or had actually shot themselves or other family members. **RT VII 35-36; 50-51**. Officer Real testified to a man arriving at his door at 3:00 to 3:30 a.m., cut in several places and bleeding all over himself. The man said his brother had hit him in the head with an axe and had a rifle and was holding some children hostage in the house at the other end of the village. **RT VI 238-239**.

Village residents demanded, and NSB required, that the officers be available for service of any kind at any time, day or night, and even on ostensible "regular days off." Even in the absence of violent crime, requests for officer services varied widely, from a mother and daughter fight at a village school **RT V 110** to a son disturbed that his father was going to use up all the good water in the family water tank. **RT VI 136**. One officer was ordered by NSB to take care of the village residents' tax claim forms with the IRS even though it was his purported scheduled "day off." **RT II 137-138**. As one veteran police officer put it: "There are just an endless number of things that I certainly was not used to as being part of police work." **RT VI 221**. Officers also had to interdict and control the influx of alcohol into the villages, whether the villages were "wet" (open access to alcohol), "damp" (possession legal but importation illegal)

or "dry" (all possession and importation of alcohol illegal).[4] **RT I 150, 153.**

The officers were assigned NSB housing that contained two NSB telephones located in the officer's living area and in the bedroom. **CR 316-324**. Each officer had CB radios at home, in the NSB vehicle and carried hand-held radios with ranges of one to two miles. *Id.* There was no dispatcher to screen calls or requests for service made by telephone or radio. *Id.* Officers were approached and requested for service at any time, day or night.

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[4] Officers also performed the function of jail guard, even if the only jail available in the village was the public safety officer's patrol vehicle. **RT II 130**. They had to care for prisoner provisions, including meal preparation and cleaning the prisoner's cell and "honey bucket", the bush Alaska toilet. **RT II 139-141; III 227; VI 106.** Officers had to perform mechanical work on all NSB vehicles, including snow machines and 3-wheelers. **RT VI 217.** Officers needed to learn the cultural and social life of the village. Officers were encouraged to become part of the community. They participated in Eskimo festivals and games. **RT VI 113-114**. As the native officer put it, the Inupiat translation of public safety officer is "someone who takes people away." He saw his role as public safety officer to show the village residents that "this was not always the case." **RT II 265.** Officers had to be the medical examiner to determine cause of death. **RT VI 219.** Officers were required to respond to barking dogs and control vicious dogs running loose because of the problem of rabies. **RT VI 220**.

D. NSB Adopted A Flextime Policy Which Applied Only To Village Assignments.

In 1986 the FLSA became applicable to public employers. NSB officers were informed by their supervisors that no overtime would be paid to officers assigned to a village and they were actively discouraged from making such claims for overtime. **RT V 93-94; VI 121-124**. The assumption was that officers were paid for 40 hours a week in the village and any extra hours could be traded out by employing "free" hours as flextime on quiet days to come later in the week. **RT V 95**.

Under NSB's flextime policy, only actual response time of an officer to an official request for service was to be counted toward the 40 hours per work week.[5] Other than three hours a day for office time, NSB officially set no scheduled hours of work. Officers were expected to be available for work any day, and any hour, whether it was designated as a regular day off or even an official holiday.

Long hours of work in the middle of the night were to be offset or "flexed" against "quiet time," the next day or later in the week. **RT XI 62-63; RT V 93.** Under the flextime policy, a 3:00 a.m. call-out and response to a gun call was traded out for allegedly equivalent "quiet time" at some undetermined time during some day in the future. **RT II 106-107**. At trial, even NSB's own officer

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[5] After April 1988, and the attempted adoption of 29 U.S.C. § 207(k) partial exemption, village officers were paid on basis of 75 hours in a two-week payroll period. Officers were then to keep their work to 37-1/2 hours a week.

witness, Officer Hinken, admitted that determining when an officer was on duty or off duty under the flextime schedule was a "vague" and "gray area." **RT XI 79.**

The NSB director admitted that there was no system for tracking the hours and minutes of this village flextime schedule. **RT XI 63.**[6] NSB didn't produce any records to show when flextime began or ended on day-by-day, week-by-week or any time period.

Since there was admittedly no mechanism to track flextime, an officer didn't know when flextime began or ended or when overtime was being accrued. **RT I 199.** If an officer complained to his sergeant about working excessive hours, the sergeant could and did dismiss such claims with the instruction to "flex" the time out later. **RT II 125; X.1 58-59.** However, this excuse was quickly followed with the admonition that the officer could not leave the village uncovered nor refuse to respond to a call for service while he was "flexing" his time. **RT IV 135; VI 241.** As one of NSB village supervisors reported in an official memo, the village officer was "trapped" in the village on uncompensated standby time. **Ex. 43.**

E. NSB Concededly Maintained False Time Records of Officer's Village Time.

NSB admitted that the daily timesheets of officers were filled out by a supervising sergeant in Barrow. **RT**

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[6] NSB counsel again admitted to the Ninth Circuit panel at oral argument that there was no NSB system to track these flextime hours.

V 191. NSB admitted that, in virtually all cases, these time sheets were signed by the officer in blank and later filled out without officer input. Each timesheet with only minimal deviation showed 8-hour days for 5 consecutive days each week without any fluctuations. *Id.* 200.

NSB's Deputy Director further conceded that such timesheets did not accurately reflect the actual time of officers working in the village. *Id.* at 206. Finally, he admitted that the Department knew that the entire system of recording actual work time for the officers was false and misleading. *Id.* 207.

F. <u>How the Questions for Review Were Raised</u>.

Prior to trial, the officers moved for partial summary judgment on liability on the following two issues among others:

(1) that NSB violated its record keeping obligation under Section 11 of the FLSA, 29 U.S.C. § 211(c); and

(2) that NSB's "flextime" scheme, which had no start and no end, was illegal under the FLSA, particularly when coupled with lack of accurate records of hours worked in "flexing" time. **Clerks Record (CR) 126.**

This motion was denied. **CR 150.**

The officers also filed a ***motion in limine*** to preclude NSB from introducing evidence concerning NSB's illegal "flextime" system. **CR 110**. This motion was also predicated on NSB's conceded record keeping violations. This motion was denied. **CR 150**. The officers also filed a ***motion in limine*** seeking to preclude NSB's use of flextime evidence because it did not constitute proper

rebuttal evidence of "accurate estimates" of time worked under *Mt. Clemens*. This motion was also denied. **CR 198**. Finally, at trial, the plaintiffs made an oral objection to evidence concerning NSB's "flextime system" because it was illegal per se under the Fair Labor Standards Act. **RT I 12 - 15**. This motion was denied. *Id.*

At the close of the trial, the officers again moved for judgment under Rule 50(a) Federal Rule of Civil Procedure based upon each officer's estimate of additional and uncompensated work time from their recollection and review of police records and diaries. NSB did not rebut this evidence with evidence of exact hours worked. Instead, NSB offered only its flextime system to demonstrate officers should not have had uncompensated time. **RT XIV 37 - 38**. The officer's motion was denied. *Id.*

The jury returned a verdict for NSB finding *inter alia* that there had been no record keeping violation and no uncompensated work time of the officers. **CR 328**. The officers then filed a motion for JNOV under Rule 50(b). **CR 331**. The officers also filed a motion for new trial under Rule 59 based on the "absolute absence of evidence" to support the jury finding of no record keeping violations under the FLSA. Both motions were denied. **CR 345**. The Ninth Circuit, in an unpublished MOJ, affirmed the jury verdict.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Interpretation of the Officers' Burden of Proof Is Squarely In Conflict With the U.S. Supreme Court's Decision In Mt. Clemens Given NSB's Failure to Maintain Accurate Records.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) the U.S. Supreme Court set forth the burden of proof required in FLSA cases where records are inadequate or inaccurate. In *Mt. Clemens* the Court specifically identified the problem manifested in the case at bar. How does an employee demonstrate a violation of the FLSA and uncompensated overtime when the duty and ability to keep adequate records rests solely with the employer?

The Court recognized that when an employer, who has the statutory duty to maintain records, has not done so, the "solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." *Id.* at 687. In this instance, the Court imposed a significant burden on the employer. Once the employee has provided some evidence of performance of work for which he was improperly compensated and the amount and extent of that work "as a matter of just and reasonable inference," then the employee has carried his burden. The Court further held that:

> The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence denying the reasonableness of the inference to be drawn from the employee's evidence. *Id.* (emphasis added).

Id. at 687-88.

The Ninth Circuit in its Memorandum Decision ("Decision") determined that the officers had failed to satisfy a two step process before the burden shifted to NSB:

> In order to take advantage of this shifting burden of proof, the employee must demonstrate the employer kept inadequate work records and that he has performed work for which he was not compensated. The jury found against the officers on both points. (emphasis in the original).

See Decision, Appendix C at 17. This was error.

First, in the case at bar the deputy director of NSB admitted that accurate payroll records of village officers were not kept by NSB. Marshall testified as follows:

> Q: Isn't it a fact that village public safety officers' payroll time sheets do not accurately reflect the time they worked in the villages in question?
>
> A: That is correct.
>
> Q: Isn't it true that that's one of the requirements of the FLSA?
>
> A: Yes sir. Yes, sir, that is correct.
>
> Q: And isn't it true that the Department of Public Safety knew that the whole system was false and misleading?

A: I think that's probably fair.

RT V 206 - 207.

Second, since there were no accurate records of their time, each officer was faced with proving a violation of the FLSA and his hours of uncompensated work without payroll records to prove it. As a result each officer testified to his/her actual hours worked in the evening, late night and on regularly scheduled days off above and beyond the normal 8-hour (or 7.5 hour) five day a week schedule the NSB had arbitrarily assigned to each officer. The officers reconstructed and estimated these uncompensated hours to the best of each officers' ability, assuming that a free hour or quiet half hour during the normal work day could not be adequately "flexed" to compensate them for work performed for an hour or half hour after midnight or for work on an alleged day off or alleged holiday.

Assuming that the officers were entitled to "estimate" such hours of work beyond a normal "unflexed" work day, then this evidence was sufficient to establish that he or she had performed work for which he or she was not compensated. Nonetheless, the Ninth Circuit denied the officers the benefit of the *Mt. Clemens* lower burden of proof, because it required the officers to prove with precision their uncompensated hours of work, rather than estimate them, before the burden would shift to NSB.

B. The Ninth Circuit's Decision Is Also Squarely In Conflict With Decisions of Other Circuit Courts of Appeal.

In addition, several United States Circuit Court of Appeals have ruled that under *Mt. Clemens* the

employees' initial burden is a minimal one. *Secretary of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991). Holding that the testimony of one employee witness was insufficient to carry the burden for 244 employees, the court nonetheless noted that:

> Where the employer has failed to keep adequate employment records, it pays for that failure at trial by bearing the lion's share of the burden of proof. (emphasis added).

Id. at 792.

Similarly the Sixth Circuit held that an employee carried his burden of proof under *Mt. Clemens* by his own testimony and his own estimate of hours of uncompensated work he performed. In *Fegley v. Higgins et. al.*, 19 F.3d 1126, 1132 (6th Cir. 1994) the court held that under *Mt. Clemens* an employee is entitled to a lesser burden of proof to demonstrate that the employee has worked uncompensated hours. *Id.* The court stated: "[w]e find that the court [below] placed too heavy of a burden on the plaintiff." *Id.* In *Fegley*, the trial court had denied the employee's claims for overtime because it could not "extrapolate" from the plaintiff's evidence including the plaintiff's own testimony of his schedule and hours as to "whether Fegley [plaintiff] worked more than 40 hours in any particular week." *Id.* at 1132. This "reduced" or "minimal" burden of proof for showing the extent of uncompensated work when an employer fails to keep adequate and accurate records of employee wages and hours has been generally acknowledged. See *Martin v. Deiriggi*, 985 F.2d 129, 132 (4th Cir. 1992). *Donovan v. Williams Oil Companies*, 717 F.2d 503, 505-06 (10th Cir. 1983), *Castilo v. Givens*, 704 F.2d 181, 194 (5th Cir. 1983). Interestingly, even other published decisions of

the Ninth Circuit recognized that under *Mt. Clemens* employees are permitted to use "accurate estimates" to meet their initial burden of showing a violation of the FLSA. *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986).

Significantly, despite the fact that NSB's payroll records were "in some cases concededly false," the district court erroneously refused to grant the officer's motion for summary judgment on the record keeping violations of NSB. **CR 150**. It is indisputable that NSB did not "maintain and preserve... the starting time and length of each employee's work period," as required by 29 C.F.R. § 516.2(a)(5). Nor did NSB record the officers' "[h]ours worked each workday." *Id.* at (a)(7). Instead, the court determined to allow the jury "... to apply the federal wage and hour act to the modern day equivalents of Wyatt Earp, Bat Masterson (or perhaps more appropriately Sgt. Preston of the Royal Canadian Mounties) who also provided police service in rural areas." **CR 274 at 3**. As a consequence, NSB was able to argue at trial that record keeping "really doesn't matter a blip." **RT XIV 123**.

Despite the absence of any evidence to refute the falseness of the payroll records, the jury by Special Verdict interrogatory determined that no record keeping violations by NSB had occurred. By that response, the jury was next instructed to apply a more stringent burden of proof on the officers to show uncompensated work. As a result, the village officers' estimates of actual overtime hours worked beyond the 40-hour work week was no longer sufficient to meet the employees' burden of proof that they performed uncompensated work. In this manner, the federal court has permitted a jury to nullify the law established by this Court's decision in *Mt.*

Clemens. NSB was rewarded for its record keeping violations, and instead of NSB facing the lion's share of the burden, this burden was placed at the feet of the police officers. The police officers filed a motion for new trial under Rule 59 based in part on this "absolute absence of evidence" to support the jury finding on record keeping. **CR 331**.

The Ninth Circuit Court of Appeals countenanced this contortion of *Mt. Clemens* on several grounds. First, the court opined that NSB had produced evidence that the signing of blank timesheets and falsification of payroll records procedure was "instituted to insure that the village officers were paid on time." Decision at App. 17. Since the villages were remote and there was no regular mail service, the decision seems to ask, what else could NSB do? *Id.*

There is no "good faith" excuse for an employer's lack of valid record-keeping practices. The requirement of record-keeping is absolute. *See*, 29 U.S.C. § 211(c) and 29 C.F.R. § 516.2. There is no exception to an employer's obligation to maintain accurate payroll records under the FLSA due to remoteness of the job site or the logistical difficulties presented by bush Alaska.

Moreover, officers could have been paid on a delayed rolling two week or even three week basis. In fact, this process was described at trial by a former Chief of Montana Highway Patrol for paying rural officers. **RT III 38 - 41**. He described how rural officers kept daily notebooks for review by supervisors and mailed timesheets to those supervisors for later review. *Id.* Then, these rural officers in Montana were paid on a two week delayed basis. *Id.*

Second, the court also excused these violations because the officers received their pay stubs and could have reported any discrepancies. Decision at App. 17. There is no requirement in a law that employees have a duty to complain or report deliberate inaccuracies in the payroll records. *DePasquale v. Williams-Bauer Corp.*, 151 F.2d 578, 579-80 (2d Cir. 1945) (estoppel defense does not arise from failure to object at the time of acceptance of payment). Recordkeeping is the employers' duty under the FLSA. 29 U.S.C. § 211(c).

Finally, the Ninth Circuit decision implies that record-keeping violations were rebutted by evidence that NSB put fax machines in the villages in the Fall of 1989. Decision at App. 17. Interestingly, this action was taken only after the instant lawsuit was filed in June, 1989. After the use of fax machines started, more overtime was paid to officers - most likely because more accurate and complete record-keeping was possible. As Officer Donovan testified at trial: "after July 1989 (date the lawsuit filed). . . officers in the villages were then authorized overtime. The practice has carried through to today." **RT VII 139**. Despite this ameliorative result of the lawsuit, NSB benefitted mightily from its false timekeeping practices.

This case is a transgression of the principles announced in *Mt. Clemens* by this Court and the decisions of the several circuit courts of appeal. This Court's supervision is required to uphold the uniformity of federal law and compliance with *Mt. Clemens* sanctions for employers who purposefully violate the record-keeping requirements of the FLSA. This law must apply to the employer in bush Alaska with the same force as it applies to police departments in Los Angeles.

C. The Unique "Flextime" System Employed by NSB Violates the FLSA.

The decision of the Ninth Circuit Court of Appeals also upheld the NSB's novel flextime procedure on the grounds that the FLSA and its implementing regulations do not require work of a set number of hours per day or "require an employee to serve in consecutive hours each day." Decision at App. 14. The officers submit that this raises an important question of federal law which should be decided by the U.S. Supreme Court.

NSB's flextime system for its police officers is not based upon traditional notions of this liberal employment concept. Normally a flextime work schedule is any full time schedule where employees do not work a traditional 8 to 5, Monday through Friday work week. The work schedule is either delayed or advanced at the preference of employee to accommodate demands such as day care or education. These flextime systems are usually adopted at the request of employee for the employee's benefit.

Conversely, NSB's flextime system differed in that it required an officer to trade out actual work time when things heated up in the village against some undetermined and unknown "quiet time" of indeterminate length (10 minutes or 10 hours) to occur sometime later in the work week or pay period. This flextime procedure was concededly adopted by NSB to meet its goal of paying no overtime to village officers even though they were sometimes assigned to villages alone for extended periods of duty.

Plaintiffs were dispatched to reside in remote villages and told to "flex" their time in order to avoid accrual of overtime. **RT I 198; Ex. 35, 39, 51.** This system

applied only to village officers and not to officers stationed in Barrow. **RT I 199**.

NSB formalized the flextime schedule by the "Village Work Schedule" memorandum of the Director in January of 1988. **Ex. 39**. Under this policy, the village office was to be open for only three hours a day, five days a week. The officer was directed to "use the remaining 22.5 hours as flexible time [for] call out, emergencies, and meetings and other business associated with maintaining a village post." *Id.* The officer was instructed to work only the exact number of hours necessary to respond to village needs on a 24-hour basis 7 days a week including the officer's ostensible two days off.

In practice this was unworkable. For example, the officers noted that actually putting an inebriated village resident in detox might involve a short time period. However extended hours were worked after that just watching and caring for the prisoner until the effects of the alcohol wore off. These long hours of work, usually occurring after midnight, were to be traded off with supposed "quiet time" in the village in the following afternoon or perhaps spread over several alleged days of light duty. Hours of work from 2 a.m. to 5 a.m. are not equivalent to the same hours from 2 p.m. to 5 p.m. where the officer was still available for village residents' demands.

Under NSB's flextime scheme, an officer could be off duty intermittently until there was a specific call to duty by a village resident. It was undisputed that even while on "quiet time" flexing out prior work hours, each officer was required to remain available to respond to any village resident's request for service on a 24-hour basis. However, not until the officer received a call, grabbed his

gun, and responded to a call for service or wrote an incident report would NSB consider the officer "on duty" with time accruing under the flextime system. See **RT XI 58**.

At trial, Officer Weiss testified why flextime didn't work as a means of limiting the number of hours of work.

Q: And why didn't you flex your time?

A: I think maybe initially I tried, but flextime is a concept that simply didn't work. So it was pretty well given up by myself shortly after my assignment to Anaktuvuk Pass.

Q: And why in your experience didn't it work?

A: Well, again there was really no accounting for that. The concept was you would spend a certain number of hours in the office and then respond to other calls as they occurred. Very frequently I found that the number of hours that I was allowed to stay in the office simply wasn't enough to service that community and do the things that I needed to do. So on the general basis, I wound up still putting in 6, 7 hours a day at the office and then responding to all the call outs as they occurred. Beyond that, if I did use a flex procedure for perhaps 12 hours one day and tried to work only 4 hours the next day, at the end of that 4 hour block inevitably something would come up that I would have to respond to. So that flexed off time really wasn't free of association with the job. I still had to respond to anything that occurred. So there was no real divorce from

work during that period. In practice, I just found it to be totally unworkable.

Q: Was there any attempt by the North Slope Borough to track flextime?

A: No. There was no mechanism provided to me, no effort to do that.

Q: Did you know when flextime was to begin and when it was to end?

A: No. I didn't know when flextime began or ended anymore than I knew when I got into a situation of overtime.

RT I 198 - 199.

Officers argued and made repeated applications to the court that this flextime policy was illegal under the FLSA. The grounds for ruling it was illegal were several. First, it is undisputed that NSB never made any attempt to track or record flextime hours. There was no attempt by NSB to record the admittedly fluctuating daily work hours of officers in a village assignment all in violation of 29 U.S.C. § 211(c) and 29 C.F.R. § 516.2.

NSB, instead, argued that it expected officers to "use common sense" and exercise discretion to track their "flex hours" properly. Officers submit that under the FLSA, this was an improper shifting of the statutory duty to keep accurate records. Moreover, as it turned out, the penalty for the failure to keep these required records of work was ultimately placed on to the shoulders of employees.

Second, NSB argued that officers understood that they were supposed to "track their flextime" and any failure that might have caused overtime was the officer's problem. This permitted NSB to use flextime as a sword. Thus, flextime is illegal. It was used as a means to obtain employee waiver of the statutory right to overtime required by the FLSA. As this Court ruled in *Brooklyn Savings Bank v. O'Neal*, 324 U.S. 697, 707 (1945), "No one can doubt that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." Further, NSB attacked officer estimates of uncompensated work by accusing the officers of disobeying the direct order to flex their work time. **RT II 28**. Since NSB chose not to have time records of flextime, the flextime procedure and its use as a defense created an unreasonable and illegal burden of proof that was improper under *Mt. Clemens*.

Third, the NSB flextime procedure permitted NSB to "stretch" hours of one employee over 24 hours, 7 days a week. Such "stretching" of employee's work is inimicable to the founding principles of the FLSA.[7] The NSB knew and the Department of Public Safety superiors conceded that to provide 24-hour police presence in the

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[7]In 1937, President Roosevelt argued that "[a] self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours." (emphasis added), Franklin Roosevelt, Public Papers and Address "The Constitution Prevails," 1937 Volume, The McMillan Co., New York 1949, pp. 210 - 211; quoted in Nordund, *A Brief History of the Fair Labor Standards Act*, 39 Labor Law J. 715, 719 (1988).

villages with traditional 8-hour shifts as was used in Barrow, it would require at least four or five officers. **RT VIII 9 - 10**. NSB was fully aware that the 24-hour, 7 days a week readiness to respond created excessive strain on the lives of officers assigned to the village. Officers could not be expected to provide such services indefinitely. **RT V 183 - 185**. NSB also had to know that a single officer assignment to a remote village would absolutely result in overtime. It was recognized and generally acknowledged by NSB superiors that such 24-hour engagement for an extended period of time was responsible for "officer burnout," particularly when the officer was assigned to the village alone. **RT V 185 - 186.**

The remedial purpose of the FLSA is clear. Congress enacted the overtime provisions of the FLSA to place a heavy financial burden on employers to ensure employment of additional employees. NSB's flextime procedure frustrated this policy of the FLSA. Instead of hiring additional officers to provide 24-hour coverage, the NSB determined to "stretch" a single police officer's time to cover a village for 24 hours and avoid payment of overtime.

The flextime example described in the Decision of the Ninth Circuit Court of Appeals consisting of uneven work days of three hours one day, ten hours the next, etc. was not NSB's flextime procedure for its officers. *See* Decision at App. 14. A twelve, or fourteen hour day was to be made up in increments of hours or minutes or seconds of "quiet time" where an officer was standing ready at any hour of the day or night for any village resident's request for service. Flextime occurring over 24 hours from early morning hours to late evening hours to

hours after midnight is not flextime -- it is working 24 hours a day.

Officers submit that such a system to frustrate the ameliorative purpose of the FLSA is inimicable to that federal law. NSB should have been precluded from using flextime to stretch hours of work as a defense to the demand of overtime hours made by each officer for work performed beyond the normal eight hour day and on regular days off.

D. Several Reasons of Importance Require the U.S. Supreme Court's Review of NSB's Novel and Unique Flextime Procedure

First, NSB will continue to man village assignments with one or two village officers to cover those villages on a 24-hour basis, seven days a week. Although fax machines are in place in each village, by the decision of the Ninth Circuit Court of Appeals, NSB has been told that its flextime policy is perfectly acceptable under the FLSA. As a result, officers of NSB continue to be required to "stretch" their time so that NSB can meet its 24-hour police presence and law enforcement needs in remote villages with minimal staffing expense. Violation of federal law is alive and well on the North Slope of Alaska.

Second, the "burnout" and turnover of officers in village assignments continues unabated. As long as flextime continues as an acceptable means of avoiding accrual of overtime, NSB will not commit any resources to ensure officers are properly compensated for remote village assignment. It is interesting to note that of the 17 officers who filed this lawsuit, filed in June, 1989, only two remain employed with the NSB Department of Public

Safety. These remaining two are also employed in Barrow, not in the villages.

Third, this Court's supervision is required to address the question of what is a permissible employer defense to "estimates" of uncompensated work time under *Mt. Clemens*. Once an employer, as NSB, has violated the record keeping requirements of the FLSA, what evidence, if any, other than "evidence of the precise amount of work performed" may an Employer present to "negative the reasonableness" of employee estimates. *Anderson v. Mt. Clemens Pottery, 328 U.S. at 687.* NSB's illegal flextime system and any evidence which does not "specifically and expressly" rebut the inferences from employee evidence should not be permitted. *Id.* at 693. See also, reference to extent of rebuttal discussed in *Brock v. Seto*, 790 F.2d at 1448.

Fourth, there existed and more likely than not continues to exist a blatant disregard for the requirements of federal law in the North Slope Borough of Alaska. Deputy Director Marshall was assigned by the Director of the Department to address NSB's compliance with the FLSA after this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). He had studied the application and requirements of FLSA to police departments at the Southern Police Institute in Kentucky, a training center for law enforcement personnel. **RT V 186**. In that study he concluded as follows:

> Faced with this fact, it would probably be best if agencies affected by the Act [FLSA] adopt the tactics of the legendary unnamed, perennially victimized woman who said, 'When rape is

> inevitable, one might as well relax and enjoy it.' While this writer, in common with most administrators finds little to enjoy in applying the Fair Labor Standards Act to the operation of his [Police] agency, knowledge of the major provisions of the Act can at least allow him a certain measure of relaxation in dealing with it. (emphasis added).

RT V 189 - 190.

A major, significant and wealthy public employer in the State of Alaska found "little to enjoy" in complying with federal law. In response, NSB superiors embarked on a concerted and well thought out system to avoid the financial impact of that federal law. In December of 1987, Deputy Marshall prepared a memo to the Chief Administrative Officer of NSB. In this memo he identified the "Statement of the Problem" as:

> Fairly rigid requirements as to work weeks and work hours within the work week that are set forth by the North Slope Borough Personnel Rules have created the potential for viable demands for overtime payment far in excess of the budgetary allocation for such payment. . . It is the author's purpose in this document to present for administrative consideration the available options under the FLSA which would allow for increased flexibility of scheduling and reduction of overtime accrual and to suggest methods of implementing those options which would be consistent with the NSB Personnel Rules. (emphasis added)

Ex. 51. It was immediately after this memo by Deputy Marshall and its statement of the problem, that Director

Martin distributed his memorandum on the village officer work schedule of January 1988. **Ex. 39**. As noted, he required three hours a day for office work in the village five days a week, but he then instructed that the remaining 22.5 hours for seven days was to be flexed by the officers. Flextime was the method employed to avoid the "problem" with the FLSA identified by Marshall. Flextime to stretch officer hours provided the "increased flexibility of scheduling for reduction of overtime accrual." **Ex. 51**.

Finally, this Court should not permit NSB to nullify or deaden the impact of the Act by forcing its officers to juggle intermittent minutes of "down time" with unrecorded work time at 6 a.m., midnight or 3 a.m. in order to avoid its obligation to pay under the FLSA. This Court's supervision is required to state that the FLSA does apply to rural police forces, the modern day equivalent of Wyatt Earp, whether in Alaska or Montana. This Court should review this novel procedure of the NSB in flexing officer time over 24 hours and prevent this abuse of the law.

CONCLUSION

Each officer estimated his or her actual hours of uncompensated overtime assuming that flextime did not offset those hours worked during alleged quiet times in the normal 8 - 5 day. Petitioning officers estimated their hours of uncompensated overtime at trial with a specific total number of hours. Under *Mt. Clemens*, this proof was sufficient to meet each officer's minimal burden to shift to NSB the duty to come forward with evidence of precise hours worked. NSB did not even attempt such proof but instead attacked the unreasonableness of the

officers failure to live and work by its flextime procedures. This Court should reverse and remand for an order entering judgment for each of these officers at the amount of each one's estimated overtime hours.

DATED this 26th day of September, 1994.

RANDALL G. SIMPSON
JERMAIN, DUNNAGAN & OWENS, P.C.
Attorney for Petitioners

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

No. A89-319 Civil

ROY RUFFINO, ROBERT KROGSENG, RICK SWANSON, JEFF DEUTSCH, MARLIN "DUKE" CIRCLE, MICHAEL DONOVAN, ANDREW TOOYAK, JR., DANIEL NELSON, MICHAEL McCARTHY, HANNS WEISS, TIM ROUTEN, LYNN ATHMANN, RONALD W. EARWOOD, JAMES LOMER, JERRY McFARLAND, SAMUEL DAVID REAL and DAN SHIREY, on behalf of themselves and all other employees of the North Slope Borough similarly situated,

Plaintiffs,

vs.

NORTH SLOPE BOROUGH,

Defendant.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant NORTH SLOPE BOROUGH recover of the plaintiffs ROY RUFFINO, ROBERT KROSGENG, RICK SWANSON, JEFF DEUTSCH, MARLIN CIRCLE, MICHAEL DONOVAN, ANDREW TOOYAK, DANIEL NELSON, MICHAEL MCCARTHY, HANNS WEISS, DAN SHIREY, JAMES LOMER, RONALD EARWOOD, SAMUEL DAVID REAL, LYNN ATHMANN, and JERRY MCFARLAND the costs of action.

Total costs taxed by the clerk in the amount of $19,809.92 in favor of defendant and against plaintiffs.

APPROVED: Costs retaxed disallowing total of $1,900.24 by order of magistrate Judge John D. Roberts.

/s/_____
U.S. DISTRICT COURT JUDGE

DATE: June 27, 1993

/s/ Phyllis Rhodes_____
Clerk

/s/ Inez Lee_____
(By) Deputy Clerk

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

No. A89-319 Civil

ROY RUFFINO, ROBERT KROGSENG, RICK SWANSON, JEFF DEUTSCH, MARLIN "DUKE" CIRCLE, MICHAEL DONOVAN, ANDREW TOOYAK, JR., DANIEL NELSON, MICHAEL McCARTHY, HANNS WEISS, TIM ROUTEN, LYNN ATHMANN, RONALD W. EARWOOD, JAMES LOMER, JERRY McFARLAND, SAMUEL DAVID REAL and DAN SHIREY, on behalf of themselves and all other employees of the North Slope Borough similarly situated,

Plaintiffs,

vs.

NORTH SLOPE BOROUGH,

Defendant.

AMENDED JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED:

That the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant North Slope Borough recover of the plaintiffs Roy Ruffino, Robert Krogseng, Rick Swanson, Jeff Deutsch, Marlin "Duke" Circle, Michael Donovan, Andrew Tooyak, Jr., Daniel Nelson, Michael McCarthy, Hanns Weiss, Dan Shirey, James Lomer, Ronald W. Earwood, Samuel David Real, Lynne Athmann, Jerry McFarland and Tim Routen the costs of action.

Total costs taxed by the clerk in the amount of $19,809.92 in favor of defendant and against plaintiffs.

Costs retaxed disallowing total of $1,900.24 by order of Magistrate Judge John D. Roberts.

Total costs after retaxation recoverable by defendant North Slope Borough from plaintiffs is $17,909.68.

APPROVED this 18th day of November, 1992.

/s/
JUDGE OF THE U.S. DISTRICT COURT

APPENDIX "C"

Not For Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 92-36866
D.C. No. CV-89-00319-JKS

ROY RUFFINO; RICK SWANSON; JEFF DEUTSCH; MARLIN "DUKE" CIRCLE; MICHAEL DONOVAN; ANDREW JR. TOOYAK; HANNS SWISS; LYNNE ATHMANN; RONALD W. EARWOOD; JAMES LOMER; JERRY McFARLAND; SAMUEL DAVID REAL; TIM ROUTEN; ROBERT KROGSENG and DAN SHIREY, on behalf of themselves and all other employees of the North Slope Borough similarly situated,

Plaintiffs-Appellants,

vs.

NORTH SLOPE BOROUGH,

Defendant-Appellee.

MEMORANDUM

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted April 7, 1994
Seattle, Washington

Before: TANG, BOOCHEVER, and REINHARDT, Circuit Judges

Appellants are former or current law enforcement officers employed in remote Alaskan villages by the North Slope Borough Department of Public Safety ("the Borough"). The officers brought an action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1988), for overtime compensation. The district court denied various motions brought by the officers, and rendered judgment based on the jury's verdict for the Borough. The officers appeal.

We have jurisdiction under 28 U.S.C. § 1291 and affirm.

DISCUSSION

I. The compensability of on-call time

The FLSA requires overtime compensation for employees who work beyond 40 hours per week. See 29 U.S.C. § 207(a)(1). However, public agencies are exempt from paying overtime to fire protection and law enforcement personnel for a certain period beyond 40 hours per week according to the formula set forth at 29 U.S.C. § 207(k). Applying this formula, the Borough need not pay overtime to the officers until they serve over 85 hours per two-week pay period.

We addressed the applicability of overtime provisions to "on-call" time in Owens v. Local No. 169, 971 F.2d 347 (9th Cir. 1992). To determine whether on-call time is spent "predominantly for the employer's benefit" and thus is compensable under the FLSA, Armour & Co. v.

Wantock, 323 U.S. 126, 133 (1944), we look to "(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties." Owens, 971 F.2d at 350.

> Courts have considered a number of factors in determining whether an employee plaintiff had use of on-call time for personal purposes: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employees movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time. Such a list is illustrative, not exhaustive. No one factor is dispositive.

Id. at 351 (footnotes and citations omitted).

Some of the factors favor the officers' claim for overtime on-call compensation while alone in the village. The Borough required 24-hour coverage of the villages. If an officer was covering a village alone with no partner, the officer was required to stay within the area (usually within 1-2 miles of the village) to ensure radio contact and quick response time. There were thus rather rigorous geographical restrictions on the officers' movements.

The officers also presented evidence that they were subject to interruptions due to the villagers' direct access to the officers' homes. However, the record on appeal

does not establish that these interruptions occurred after the required hours per week had been served. Cf. Renfro v. City of Emporia, Kan., 948 F.2d 1529, 1538 (10th Cir. 1991) (fire fighters required to answer an average of four to five calls per day during off-duty time were entitled to overtime compensation), cert. dismissed, 112 S. Ct. 1310 (1992).

Finally, officers serving alone in the village could not trade on-call responsibilities. In Owens, the on-call policy was held not to create compensable waiting time in part because as part of an on-call pool, the employees could decline to respond to after-hours calls. 971 F.2d at 357. Cf. Brock v. El Paso Natural Gas Co., 826 F.2d 369, 373-74 (5th Cir. 1987) (on-call policy not unduly restrictive in part because employees could trade on-call responsibilities).

Other factors cut against the officers' claim for compensable on-call time. The officers serving with a partner were not subject to such excessive geographical restrictions, the frequency of after-hours calls was reduced, and the partners could trade on-call status.

Most significantly, even the officers serving without a partner were able to engage in a substantial number of personal activities while on-call. The officers hunted and fished, exercised, engaged in various hobbies, socialized, took educational courses, and even worked second and third jobs. The evidence indicated that there were often long periods with little official enforcement activity in which the officers were free to pursue their personal interests.

While no one factor is dispositive, Owens, 971 F.2d at 351, the Department of Labor regulations focus on the employee's ability to engage in other activities while on-call. 29 C.F.R. § 785.15 states that on-call time is compensable where "the employee is unable to use the time effectively for his own purposes." This court has found the nature of the personal activities in which an employee participated while on-call "an essential factor in the Supreme Court's 'primarily for the benefit of the employer' test." Owens, 971 F.2d at 356.

Moreover, courts have consistently held on-call time noncompensable where employees were able to participate in a substantial number of non-work activities while on-call. See Gilligan v. City of Emporia, Kan., 986 F.2d 410, 413 (10th Cir. 1993) (on-call restrictions on personal activities of water and sewer department employees "not so prohibitive that it can be said that their on-call time is spent predominantly for the employer's benefit"); Owens, 971 F.2d at 353 (plaintiffs able to attend out-of-town sporting events, golf, bowl, attend church, take out-of-town trips on the weekends, engage in other employment, coach children's teams, attend school, participate in athletics, dine at restaurants, watch movies, fish and hunt, etc.); Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, 673 (5th Cir. 1991) (en banc) (plaintiff engaged in other activities away from work, such as shopping and occasionally going to restaurants), cert. denied, 112 S. Ct. 882 (1992); Boehm v. Kansas City Power and Light Co., 868 F.2d 1182, 1185 (10th Cir. 1989) (free to use off-duty time as wished); Halferty v. Pulse Drug Co., 864 F.2d 1185, 1189 (5th Cir. 1989) (on-call time not compensable where ambulance dispatcher who worked at home could entertain guests, sleep, watch television, do laundry, and

babysit); Norton v. Worthen Van Serv., Inc., 839 F.2d 653, 566 (10th Cir. 1988) (compensation denied where on-call time spent at friends' homes, church, laundromats, restaurants, and recreational facilities, demonstrating ability to engage in personal activities even where required to respond within fifteen to twenty minutes). But see Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-17 (8th Cir. 1991) (on-call time compensable where the plaintiffs' activities were restricted by having to monitor radio transmissions).

While the officers serving alone did not receive respite from the 24-hour on-call status, they were nonetheless able to engage in a substantial number of personal activities. As in Owens, the broad scope of activities in which the officers were involved "demonstrates that each [officer] had the option to engage in personal activities of his [or her] choice while on call." Owens, 971 F.2d at 353.

Moreover, "[w]hether time is spent predominately for the employer's benefit [is] dependent on all the circumstances of the case," Armour & Co., 323 U.S. at 133, and whether "such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court." Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944). The jury found that none of the officers had compensable on-call time. This finding is supported by substantial evidence in the record.

The district court properly denied the motions for directed verdict, JNOV, and new trial[1] *A fortiori*, the motion for partial summary judgment was properly denied due to the existence of genuine issues of material fact regarding the restrictiveness of the officers' on-call status.[2]

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[1]The denial of a motion for directed verdict under Fed. R. Civ. P. 50(a) and a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) are reviewed *de novo*. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992) (standard for reviewing JNOV); *In re: Hawaii Federal Asbestos Cases*, 960 F.2d 806, 816 (9th Cir. 1992) (motions reviewed under same standard). A directed verdict is proper if the evidence permits only one reasonable conclusion as to the verdict, *In re: Hawaii*, 960 F.2d at 816, and a jury verdict is affirmed upon motion for JNOV if there is substantial evidence supporting the verdict. *Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987). "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* at 1371.

The denial of a motion for new trial under Fed. R. Civ. P. 59 is reviewed for an abuse of discretion. *Landes*, 833 F.2d at 1372. A new trial will not be granted unless the verdict is against the clear weight of the evidence. *Id.*

[2]The denial of a motion for summary judgment is reviewed *de novo*. *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *cert. granted*, 114 S. Ct. 543 (1993). This court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

II. The "flextime" system

Under the "flextime" system, officers were required to set-off extra hours worked in one day against "down time" during another day. The former Director of the Department of Public Safety, Larry Packer, testified that the Borough was concerned with the overall hours the officers worked during a two-week pay period (75 hours), although the officers' time cards reflected 7.5 hours of work per day.

The Borough personnel policies specify that each officer is required to work 37.5 hours per week,[3] the scheduling of the hours is left to the discretion of the officer, each officer shall have two days off per week at his or her discretion (subject to prior approval), and that the schedules "should be flexed as the particular needs of each village dictate[]." Overtime is paid for hours worked over 85 in any two-week pay period, and for over 12 hours worked during any 24 hour period.

The officers argue that due to the intermittent hours worked, the flextime system allowed the Borough to circumvent paying overtime to the officers. But, as explained below, the flextime system, *itself*, did not prevent the payment of overtime. To a considerable extent, the officers' real complaint is with the record-keeping system: the officers could not claim that the flextime system was used to circumvent paying overtime if they agreed that an accurate record of hours worked

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[3]Prior to July, 1987, the officers were required to work 40 hours per week.

per day had been kept. The claims relating to the Borough's record-keeping are addressed in the next section.

The officers also claim that there was "no known or consistent beginning or end [to the work period]: so that no one "would know how many hours had been worked in any given day, week or month or when an overtime hour was reached." [Opening brief at 19.] However, there was indeed a defined two-week pay period. That an officer did not know how many hours had been worked in a given period of time is, again, an allegation regarding the failure of the record-keeping system.

The next complaint about the flextime system is that it is in reality a "compensatory time-off" policy, which the officers contend is illegal because the Borough's flextime system does not conform to 29 U.S.C. § 207(o).[4] The officers imply that extra hours worked during a pay period were required to be "flexed"outside of that pay period at some future time (thus avoiding the Borough's responsibility to pay overtime for that pay period). However, the officers point to nothing in the record that proves that the flextime system was

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[4] § 207(o) provides, in part:

Employees of a public agency . . . may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

implemented in this way.[5] Uneven work days throughout a pay period does not create a compensatory payment system. Only when time off is given *in lieu of* overtime is a compensatory time system in place.

Finally, the officers briefly contend that the flextime system "allows an employer an indirect method of asserting impermissible waiver, estoppel, and good faith defenses." [Opening brief at 24 (footnotes omitted).] The officers fail to explain this argument. We "will not ordinarily consider matters on appeal that are not specifically and distinctly raised *and argued* in appellant's opening brief." *International Union of Bricklayers & Allied Craftsmen Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (emphasis added).

The officers do not point to provisions of the FLSA or its implementing regulations which require an employee to work a set number of hours per day, or which require an employee to serve in consecutive hours each day. The FLSA prevents an employer from

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[5]The testimony cited for this assertion does not support the claim that hours were "flexed" against a future pay period. [RT II 125 (Routen) (when he told his supervisors that he had worked more than eight hours that day, he was told "Take the next day off."); RT V 23 - 30 (Krogseng) (discussed situation where he had exceeded 75 hours in two-week period and had overtime approved for subsequent time; he agreed that he was never told that he had to work more than 75 hours without overtime pay); RT VI 240 - 42 (Real) (when worked long hours for two days, told to "flex it out" and take an extra day off); RT X 58 - 59 (Packer) (Testified that officers would get overtime if they had run out of their time, but that if they hadn't exceeded their assigned number of hours, they would take care of calls "out of their flexible time".]

requiring an employee to work more than a certain number of hours per week without paying overtime. There is nothing in the FLSA that would prevent the Borough from requiring the officers to work uneven work days (such as three hours one day, ten hours the next, etc.), as long as the time worked over the two-week period does not exceed 85 hours without payment of overtime. Accordingly, the officers have failed to demonstrate that they are entitled to judgment as a matter of law that the flextime policy violates the FLSA.

Furthermore, the jury found that none of the officers performed additional work time for which they had not been paid, thus rejecting the officers' claims that they worked over the maximum number of hours per two-week pay period due to the operation of the flextime system. The motions for partial summary judgment, directed verdict, JNOV, and new trial, all of which raised these arguments, were properly denied.

III. The record-keeping system

The FLSA requires employers to keep accurate records of employee hours worked. *See* 29 U.S.C. § 211(c) ("Every employer . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him. . . ."); 29 C.F.R. § 516.2(a) ("Every employer shall maintain and preserve payroll or other records containing the following information: (7) Hours worked each workday and total hours worked each workweek."); 29 C.F.R. § 516.6(a) ("Each employer required to maintain records under this part shall preserve . . . (1) . . . all basic time and earning cards or sheet on which are entered the daily starting and

stopping time of individual employees . . . or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis.").

The officers contend that the Borough failed to keep accurate records and therefore should have had the burden of proof to disprove the officers' estimate of overtime worked. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-688 (1946), the Supreme Court held that where the employer has failed to keep accurate and adequate records of hours worked and the employee proves he has not been compensated for work done, the burden of proof shifts to the employer to rebut the estimate of hours worked by the employee.

> An employee . . . has the burden of proving that he performed work for which he was not properly compensated. . . .
>
> When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove and precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the [FLSA]. In such a situation we hold that the employee has carried out his burden if he proves that

> he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687 (emphasis added). *See also McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989).

In order to take advantage of this shifting burden of proof, the employee must demonstrate that the employer kept inadequate work records and that he has performed work for which he was not compensated. The jury found against the officers on both points: the Borough had not failed to keep accurate and adequate payroll records and one of the officers performed additional work for which they had not been paid.

The officers introduced evidence that until 1989, blank signed timesheets of the village officers were filled out by the supervising officers in Barrow to reflect 7.5 hours of work per day. Deputy Director of Public Safety John Marshall agreed that the Borough's timesheets did not accurately reflect hours worked each day by the village officers.

As previously noted, the officers worked in isolated villages, often with no regular means of transportation to the Borough headquarters at Barrow and without regular mail service. The Borough presented evidence that this procedure was instituted to ensure that the village officers were paid on time. The officers received pay stubs which reflected hours worked and could report any discrepancies, and were in phone contact with their supervisors about hours worked. The Borough also introduced evidence that by the fall of 1989, the villages acquired fax machines and the officers filled out and faxed certified timesheet to Barrow. The Borough introduced timesheets, overtime forms, records of overtime payments and paychecks which reflected hours reported by plaintiffs. In addition, the Borough presented evidence that the plaintiffs failed to report any unpaid overtime hours worked to their supervisors.

We conclude that the motion for partial summary judgment on the accuracy of the records was properly denied. Moreover, the verdict was not against the clear weight of the evidence, and the motion for new trial was properly denied as well.

IV. The § 207(k) plan

The officers argue that the Borough's § 207(k) plan violates the FLSA "because of [the Borough's] illegal 'flextime' system and because of the undisputed failure to keep accurate records of hours worked." [Opening brief at 34.] As previously discussed, the flextime system did not violate FLSA, and there is evidence supporting the jury's verdict that the Borough kept accurate records.

The district court's denial of the officers' motions for directed verdict, JNOV, and new trial, all of which argued that the § 207(k) was "invalid," are affirmed.

V. The jury instructions

During trial, the officers objected to jury instructions C-47 and C-48, which provided that an employer "who knows or should have known that an employee is or was working overtime is obligated to pay overtime," and that the employee is required to prove that the employer "permitted, allowed or consented to [overtime] work performed." [ER-CR 325a.] The officers objected to the burden of proof requiring them to show that overtime was "permitted, allowed, or consented" because accurate records of hours worked were not kept.

The officers agreed to almost identical instructions and submitted them jointly to the court. [ER-CR 294, p. 10-11.[6] The officers requested this instruction and may not now object to its use. *See 999 v. C.I.T. Corp.*, 776 F.2d 866, 870 (9th Cir. 1985) (district court properly denied request to withdraw previously requested instruction).

---

[6]The proposed instructions stated: "The words 'suffer' or 'permit' mean work performed within the knowledge of the employer. . . . Where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer . . . the employer's failure to pay for the overtime hours is not a violation of the FLSA"; "A part of the plaintiffs' burden of proof is to show that the defendant 'suffered' or allowed the plaintiffs to work uncompensated overtime."

VI. The motions in limine

Finally, the officers argue that the district court erroneously denied its various motions *in limine* urging the court to preclude the Borough from introducing its payroll records and evidence of its flextime system and policy requiring pre-authorization of overtime. The officers argue that *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, limits an employer's "rebuttal evidence" to accurate estimates of time worked, and that the Borough's records were not accurate.

As previously discussed, the *Anderson* burden-shifting does not come into play until the employee demonstrates that the employer's records are inaccurate or inadequate and that the employee has not been properly compensated for work done. *Id.* at 686 - 688. The jury found that the Borough did not fail to keep accurate records and that the plaintiffs did not work uncompensated hours.

There being no other argument that the motions *in limine* were improperly denied, the district court did not abuse its discretion in doing so.[7]

AFFIRMED.

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[7]The denial of a motion *in limine* is not reversible absent clear abuse of discretion. *Jaurequi v. City of Glendale*, 852 F.2d 1128, 1132 (9th Cir. 1988).

APPENDIX "D"

Fair Labor Standards Act

29 USC § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

(k) **Employment by public agency engaged in fire protection or law enforcement activities.** No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one

and one-half times the regular rate at which he is employed.

29 U.S.C. § 211(c)

Records. Every employer subject to any provision of this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] or of any order issued under this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [Secretary] as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 7(p)(3) [29 USCS § 207(p)(3)] may not be required under this subsection to keep a record of the hours of the substitute work.

Code of Federal Regulations

29 CFR § 516.2.

Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss, or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a

per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regular recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

(b) *Records of retroactive payment of wages.* Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:

(1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the employee, with the Administrator or an authorized repres-entative within 10 days after payment is made.

(c) *Employees working on fixed schedules.* With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by paragraph (a)(7) of this section, the schedule of daily and weekly hours the employee normally works. Also,

(1) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by him, and

(2) In weeks in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

Federal Rules of Civil Procedure

F.R.C.P. 50(a) and (b)

Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a

verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

F.R.C.P. 59

New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

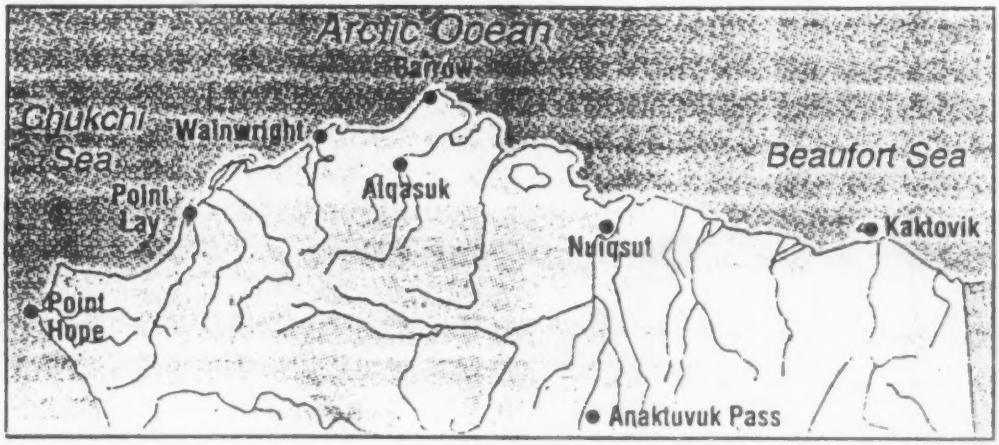
(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended

for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

APPENDIX "E"



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(2)

Supreme Court, U.S.
FILED
OCT 25 1994
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No. 94-565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYNN ATHMAN, JEFF DEUTSCH, MICHAEL DONOVAN, ROBERT KROGSENG, JAMES LOMER, MICHAEL McCARTHY, SAMUEL DAVID REAL, TIM ROUTEN, ANDREW TOOYAK, JR., and HANNS WEISS,

Petitioners,

vs.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when a jury expressly determines: (1) that an employer has kept accurate and adequate time records, and; (2) that an employee has not performed any additional uncompensated work, the employee has failed to carry his burden of proof under *Anderson v. Mt. Clemens Pottery Co.*

2. Whether the FLSA permits an employer to implement a schedule of flexible work hours which conforms with the Act's overtime pay requirements.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

Petitioners Lynn Athmann, *et al.* sued their employer, the North Slope Borough, under 29 U.S.C. § 207(a) of the Fair Labor Standards Act ("FLSA") claiming entitlement to overtime compensation. After a three week jury trial, the jury returned a special verdict finding: (1) the Borough had maintained accurate and adequate payroll records as required by the FLSA, and (2) none of the plaintiffs had any compensable "on-call" time or additional work time for which they had not been paid by the Borough. Judgment was entered on the jury verdict in favor of the Borough on June 27, 1992 by the United States District Court for the District of Alaska (Pet. App. A, pp. 1-2). An Amended Judgment and Order was entered by the District Court on November 18, 1992 (Pet. App. B, pp. 3-4). In an unreported memorandum decision of May 23, 1994, the United States Court of Appeals for the Ninth Circuit affirmed the District Court judgment (Pet. App. C, pp. 5-20).

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1994. A petition for rehearing was denied on June 29, 1994. The petition for certiorari was filed on September 26, 1994. The jurisdiction of this Court is apparently invoked by Petitioners under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Since the statutory provisions involved are lengthy, the citations alone are set forth below. The pertinent text is set forth in Appendix A, pp. 1-7.

United States Code

29 U.S.C. § 207(a)

Code of Federal Regulations

29 C.F.R. § 553.220
29 C.F.R. § 778.114
29 C.F.R. § 778.115
29 C.F.R. § 778.402
29 C.F.R. § 785.23

STATEMENT

A. Background

Petitioners are former or current law enforcement officers employed in remote Alaskan villages by the North Slope Borough Department of Public Safety ("the Borough"). The largest village has a population of 600 persons, the smallest 120, with the other villages having an average population of roughly 300, with approximately one-half the population of the villages being children. [RT I 117-119; RT II 21, 177-178, 255; RT IV 57, 165; RT V 20-21, 138; RT VI 151, 252; RT IX 151]. Law enforcement activities in the small villages occur on a peaks and valleys basis, with long periods of little or no activity. [RT II 75-81; RT X(II) 68-69, RT XI 155-173]. No more than approximately two dozen arrests occur in any single village in a year. [RT II 209; RT XII 135]. In some villages, no one is arrested during an entire year. [RT XII 135]. It was common for village officers not to have a single request for service during an entire two week work period. [RT II 75-81, 208-209; RT IV 88; RT VIII 27-28].

B. Work Schedules Of Village Officers

Because of the small populations in the remote villages and infrequent nature of activities requiring law enforcement services, the Borough adopted a two week work schedule of 75 hours of "flex time" for village officers. [Ex A, E, F, G, H, K, ID; RT II 27-28, 184; RT III 184-185; RT X 30; RT X(II) 68]. Officers originally worked a 40 hour workweek which was later reduced to a 37.5 hour workweek. [Ex H; RT III 184-185; RT V 21; RT X(II) 96-97]. The officers had only one standardized requirement in their schedule -- they were to maintain office hours at the village

station for approximately three hours a day, five days a week. [Ex K, ID; RT II 184, 211-217, 220; RT IV 59-60, 85; RT V 21; RT IX 212-213; RT XI 155]. Each officer was allowed to choose the two days off he preferred. [Ex K, ID; RT I 160-161, 211-217; RT XI 155; RT XII 97]. After an officer worked his three hours per workday, he had complete and full discretion as to how to "flex" the remaining 22.5 hours in the workweek, or the 45 hours in the two-week work period. [Ex K, ID; RT II 184-185, 219-220; RT III 185; RT IV 60-61; RT VII 61; RT VIII 183-184; RT X(II) 69; RT XI 155-174; RT XII 91-107]. If the officers were not actively responding to a call, they were free to engage in any activity they wished. [Ex K, ID; RT III 194-195; RT V 39; RT XI 155-174; RT XII 89-107].

Contrary to Petitioners' assertions, at no time were the officers instructed they were to be on active duty 24 hours a day, nor were they instructed to remain by their telephone, either at their home or at the office, to wait for telephone calls. [Ex K, ID; RT V 28-30; RT VII 168; RT XI 173]. Instead, they were instructed to use their judgment and discretion, to flex their time and use their time wisely to plan and allow for official work duties. [Ex K, ID; RT II 27-28; RT V 30; RT VII 243-244; RT IX 212-213; RT X(II) 68-69].

The Borough utilized two different recordkeeping procedures during the time embraced by the officers' complaint. From 1986 through 1988 timesheets for village officers were filled out in Barrow, Alaska by village unit supervisors. [RT X 31-35; RT XI 182-187]. The reason timesheets were initially filled out by village unit supervisors in Barrow was <u>solely</u> to avoid delays in paying village officers. [RT X 31-35; RT XI 182-185]. The remote villages in which the officers worked were isolated and unconnected by road to Barrow where the supervisors worked.

[RT I 147; RT X 31-35]. Poor weather frequently made air traffic between the village unreliable. [RT X 31-35; RT XI 182-185]. Each of the village officers knew exactly what they were being paid each and every payday. [RT X 31-35; RT XI 182-187]. As a courtesy to village officers, supervisors filled out officers' personal bank deposit slips, deposited their paychecks in Barrow banks and informed the officers of the amount deposited. [RT X 31-35; RT XI 182-187]. The officers were provided with paystubs showing regular hours worked, overtime hours worked, regular and overtime earnings, leave paid and all deductions. [RT X 31-35; RT XI 182-187]. Officers had regular telephone contact with their supervisors regarding the number of hours the officers worked and were paid for. [RT X 31-35]. Borough policy and procedure provided that if officers worked more than their assigned number of hours, all they had to do was contact their village unit supervisor and advise they had worked more than the assigned number of hours. [Ex A, C, K, ID; RT II 220].

The practice of having timesheets filled out in Barrow changed in 1988 when the villages began to acquire fax machines and the officers filled out and faxed their timesheets directly to Barrow. [RT II 21; RT IV 45-46, 63-64; RT V 139-140; RT X 35; RT XII 129-130]. By the fall of 1989, fax machines had been installed in each of the village public safety offices and all village officers were able to record their timesheets themselves and fax them directly to Barrow for timely payment. [RT IV 45-46; RT V 45-46; RT VII 162-163; RT X 35-36; RT XII 43, 129]. These timesheets contained a certification signed by the village officer which specified the hours listed were "actual hours worked" and "true and correct". [Ex NX; RT II 21-24; RT IV 63-64; RT V 46-48; RT V 141]. The officers themselves wrote in the hours they worked each day. [Ex NX; RT II

21-24; RT V 46-48]. The officers then signed those timesheets and certified the "hours shown are true and correct". [Ex NX; RT II 21-24; RT IV 63-64; RT V 46-48; RT VII 163-165]. The officers were paid the hours they themselves reported having worked. [Ex CV, CW1, CX1, DP, DQ, ET2, GR, HZ, IA, IB, IC1; RT V 46-48, 151; RT VII 163-165]. Significant amounts of overtime at the appropriate time and one-half rate required by the FLSA, which brought the officers to overtime rates of between $35 and $50 per hour, were paid to the officers for work in the villages. [Ex BO, BY, CV, CW1, CX1, DB, DP, DQ, EG, EH, ES, ET1, ET2, FD, FJ1, FX, GE, GF, GG, GK, GR, HZ, IA, IB, IC1; RT I 207-208; RT II 87-102; RT IV 52-55; RT V 24-36, 126-138; RT VI 159-165, 253-257; RT VII 69-70, 143-154, 224-226; RT VIII 80-83, 169-173].

C. The Jury's Factual Findings

Following a 14-day trial which included the testimony of 38 witnesses, admission of some 225 exhibits into evidence and extensive instructions on the law from the court, the jury returned a special verdict in favor of the Borough. [RT I-XIV, pp. 3-4 (of each volume); RT XIV, p. 41-71 (instructions); CR 328]. On special verdict the jury found: (1) the Borough maintained accurate and adequate payroll records as required by the FLSA and (2) none of the officers had any on-call time or additional hours worked for which they had not been compensated. [CR 328]. Judgment was entered on the verdict with the officers taking nothing. [CR 329].

The remainder of Petitioners' Statement is argument. To the extent a response is required, it will be addressed in Respondent's Argument.

ARGUMENT

I. Reasons For Denying The Petition For Certiorari.

A. The Ninth Circuit Court Of Appeals' Decision Regarding An FLSA Claimant's Burden Of Proof Is Not In Conflict With This Court's Decision In *Anderson v. Mt. Clemens Pottery Co.*

Petitioners' assertion that the Court of Appeals' decision conflicts with this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is mistaken. In *Anderson*, this Court observed:

> An employee ... has the burden of proving that he performed work for which he was not properly compensated....
>
> When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to

> keep the benefits of an employee's labors without paying due compensation as contemplated by the [FLSA]. In such a situation we hold that the employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687 (emphasis added).

The Ninth Circuit's recordkeeping analysis in this case was in response to Petitioners' assertion that "the Borough failed to keep accurate records and therefore should have had the burden of proof to disprove the officers' estimate of overtime worked." Pet. App. C, p. 16. The Ninth Circuit concluded "the motion for summary judgment on the accuracy of the records was properly denied. Moreover, the verdict was not against the clear weight of the evidence, and the motion for a new trial was properly denied as well." Pet. App. C, p. 18.

Petitioners' recordkeeping argument to this Court is therefore based on a hypothetical question. An error in the burden of proof could only occur if the Borough's records

had been found to be inaccurate. The jury found the records were accurate. In spite of this, Petitioners continue to base argument on their hypothetical contention to the contrary.

Even if the burden of proof were an issue in this case, the Ninth Circuit's decision correctly noted that in order to take advantage of the shifting burden of proof established by *Anderson*, the employee must demonstrate two things: (1) that the employer kept inadequate work records; and (2) that the employee performed work for which he was not compensated. (Pet. App. C, p. 17). In the instant case, it is undisputed the jury found against the officers on both points: The Borough had not failed to keep accurate and adequate payroll records and none of the officers performed additional work for which they had not been paid. [CR 328] ([Petitioners' brief has a typographical error which reported "none" as "one".] Pet. App. C, p. 17).

In light of the factual findings by the jury, there is no basis to support Petitioners' contention that the Ninth Circuit misapplied *Anderson*. Moreover, the instructions given to the jury correctly set forth the burden of proof under *Anderson* and were, in fact, the instructions requested by Petitioners. [Cr. 289, pp. 27-28; CR 315, p. 3; CR 325a; C30 and C31].

B. There Is No Conflict With The Decisions Of Other Courts Of Appeals

The Court of Appeals decision that Petitioners failed to prove entitlement to overtime does not conflict with the decisions of any other circuit court regarding an FLSA claimant's burden of proof. For the reason noted above, this is another hypothetical question by Petitioners because it erroneously assumes the Borough failed to keep accurate records.

Moreover, none of the cases cited by Petitioners, including *Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st Cir. 1991), *Fegley v. Higgins, et al.*, 19 F.3d 1126 (6th Cir. 1994), *cert. denied*, 1994 U.S. Lexis 6378 (Oct. 3, 1994) or *Martin v. Dieriggi*, 985 F.2d 129 (4th Cir. 1993), supports the proposition that when a jury finds the employer kept accurate and adequate records of hours worked and the employee has failed to prove he performed work for which he was not paid, that the reduced burden of *Anderson* is applicable.

The cases relied on by Petitioners are specifically distinguishable from the case at bar because the jury found the Borough's records were accurate and adequate. In *DeSisto*, the court held "the Schools had violated FLSA recordkeeping provisions". 929 F.2d at 791. In *Fegley*, the employer "kept no records of his work" and admitted the employee worked unpaid overtime. 19 F.3d at 1132. The court in *Martin* found the employer had destroyed its records to prevent review by the Department of Labor. 985 F.2d at 132.

C. The Ninth Circuit Properly Decided A Fact Specific Issue Regarding The Flexible Work Hour Schedule Used By The Borough

In its Sections C and D, pages 19-28, regarding scheduling and timekeeping practices, there is no suggestion by Petitioners that the Ninth Circuit did not apply the correct law. Instead, Petitioners take issue with the Ninth Circuit's view of the facts. The Ninth Circuit's interpretation of the facts and application of the settled law to the facts is correct and does not raise an important issue for review by this Court. The law is well established that the FLSA affords employers flexibility to design reasonable scheduling and timekeeping practices where unique situations make calcula-

tion or computation of employee hours difficult if not impossible. See, e.g., *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944); *Halferty v. Pulse Drug Company, Inc.*, 864 F.2d 1185, 1190-91 (5th Cir. 1989); 29 C.F.R. § 785.23. Similarly, the FLSA does not require an employer to schedule hours in any particular manner. There is nothing in the FLSA which prevents an employer from implementing a schedule of flexible work hours which conforms with applicable overtime pay requirements of the FLSA. The number of hours worked by an employee and the manner in which those hours are worked are solely matters of contract between the employer and employees. *Tobin v. Little Rock Packing Co.*, 202 F.2d 234, 238 (8th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953).

Contrary to Petitioners' unsupported arguments, there is simply nothing in the FLSA that prohibits an employer from creating a flexible schedule for employees where the demands of the job so require. Indeed, the Act and the Department of Labor regulations provide for such actions as scheduling fluctuating workweeks (29 C.F.R. § 778.114), paying employees at different rates of pay for different jobs performed at different times (29 C.F.R. § 778.115), paying employees based upon an average number of hours worked despite the fact that the hours do not necessarily represent actual hours worked, *see, e.g., Mullins v. Howard County*, 730 F. Supp. 667 (D. Md. 1990), and providing employees with a guaranteed salary that includes both straight time and overtime pay where the employees work irregular hours (29 C.F.R. § 778.402 *et seq.*). In addition, 29 C.F.R. § 553.220 specifically states that a police officer's tour of duty may include both scheduled and unscheduled periods of work.

The flexible schedule used by the Borough is, in the words of Petitioners themselves, "novel and unique". As a

result, the only real questions raised in the petition turn on the particular facts of this case alone and are of interest only to the parties to it. Petitioners are essentially asking this Court to make a third review of a lengthy trial record to see if the Court can find what a jury and two previous courts have been wholly unable to find -- proof that the Petitioners were somehow deprived of overtime compensation. This Court has ruled that such fact canvasing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Petitioners raise only questions turning entirely on the facts of this case, already resolved by a jury and two courts in favor of respondent and without any impact outside the factual specifics of this case. No important federal questions are raised by the Ninth Circuit's decision. Certiorari, therefore, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 21, 1994.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX

APPENDIX "A"

United States Code

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Code of Federal Regulations

29 C.F.R. § 553.220 "Tour of duty" defined.

(a) The term "tour of duty" is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term as used in section 7(k), means the period which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include "shifts" which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and the time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in §553.227. The tour of duty does not include time spent working on an occasional or sporadic and part-time basis in a different capacity from the regular work provided in §553.30. The tour of duty does

not include time spent substituting for other employees by mutual agreement as specified in §553.31.

(d) The tour of duty does not include time spent in volunteer firefighting or law enforcement activities performed for another jurisdiction, even where such activities take place under the terms of a mutual aid agreement in the jurisdiction in which the employee is employed.

29 C.F.R. § 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding ofthe parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies

the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employees works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as ade-

quate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he received for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

29 C.F.R. § 778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two ore more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exemptions permitting alternative methods of computing overtime pay in such cases are discussed in §§778.400 and 778.415 though 778.421.

29 C.F.R. § 778.402 The statutory exception provided by section 7(f) of the Act.

Section 7(f) of the Act provides the following exception from the provisions of section 7(a):

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek

in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

29 C.F.R. § 785.23 Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P.2d 182 (Okla. Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943).)

Supreme Court, U.S.
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No. 94-565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYNN ATHMANN, JEFF DEUTSCH,
MICHAEL DONOVAN, ROBERT KROGSENG,
JAMES LOMER, MICHAEL McCARTHY,
SAMUEL DAVID REAL, TIM ROUTEN,
ANDREW TOOYAK, JR., and HANNS WEISS,

Petitioners,

vs.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN REPLY

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ARGUMENT

A. Employer Admissions of Recordkeeping Violations are not "Hypothetical."

North Slope Borough ("NSB") has blatantly distorted the record and the undisputed facts in this case to avoid review by the United States Supreme Court. NSB is well aware that the principal officers and superiors of NSB Department of Public Safety knew and admitted that police officers in the remote villages of northern Alaska were not working 9 to 5 jobs five days a week. Nonetheless, NSB payroll records depicted just such a regular hourly workday. NSB had officers sign blank time sheets -- with the certification that these blank time sheets were "actual hours worked" and "true and correct." Later, sergeants filled in a "7.5" numerical for hours of actual work on five consecutive days a week on the time sheet and then signed their names certifying that these hours were "true and correct."

Deputy Director Marshall admitted that the whole scheme of NSB in its payroll time keeping for village officers was misleading and misstated officers' work hours in the village. **RT V. 207** Even NSB's statement at page 3 in its opposition brief to this Court that: "[l]aw enforcement activities in the small villages occur on a peaks and valleys basis," is belied by NSB's time sheets which list officer hours at a level 7.5, 7.5, 7.5, 7.5, and 7.5 straight across for five consecutive days with two blank days for alleged weekends off. There is no peak nor any valley in NSB's certified payroll timesheets for village officers. Nonetheless, NSB represents to this Court that timekeeping violations addressed in the police officer's briefing are only "hypothetical."

At trial, by obtaining a court ruling which did not require the burden of proof to be shifted to NSB and which allowed the issue of recordkeeping violations to go to the jury, NSB obtained a premium from its lax recordkeeping practices. NSB has enjoyed some measure of success both at trial to the jury and on appeal by arguing that any record keeping violations were only "hypothetical," "hypertechnical," "do not matter a blip." First, the verdict form allowed the jury to decide that payroll records were substantially accurate and that therefore the plaintiff police officers had not "proved" uncompensated work.[1] Next, the Ninth Circuit Court of Appeals refused to address the clear and undisputed recordkeeping violations of NSB. Without any analysis or recitation of evidence, the decision merely affirmed the jury nullification of the admitted recordkeeping violations as being within the clear weight of the evidence. This was error.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), this Court addressed the issue of what should occur when an employer has failed to keep the adequate and accurate records required by the FLSA. The Court observed that in the normal case the employee has the burden of proving that he or she has performed work for which either he or she has not been properly compensated. When the employer has kept the proper and accurate FLSA records, then the employee may easily

---

[1] NSB implies that because Plaintiffs participated in proposed and joint jury instructions that error is waived. Since the court had ruled that the issue of recordkeeping would go to the jury, plaintiffs resulting participation in crafting jury instructions cannot be deemed a waiver.

meet that burden by securing production of those records. Id. at 687.

The Court then noted, however, that a problem of proof is created when an employer, such as NSB, has no accurate records of time worked. In the case at bar, the payroll records of NSB showed nothing which even closely approximated an actual work day, week or month of the police officers in the villages. Even deputy director Marshall confessed that the records were false and misleading.

> Q: And isn't it true that the Department of Public Safety knew that the whole system was false and misleading?
>
> A. I think that's probably fair.
>
> Q. And isn't it also true that an inaccurate payroll system is a very effective way to make it difficult for employees to make a claim under the Fair Labor Standard Act?
>
> A. That I don't know. I would just be speculating.

(RT V 207)

Faced with a similar problem, this Court in *Anderson*, stated that the solution is not to penalize the employee and reward the employer by denying the employee recovery for any failure of proof of the extent or amount of uncompensated time. See, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. at 687. Instead, the court below designed a solution whereby even though the undisputed evidence demonstrated that records were improper or

inaccurate and even though the employees had estimated the extent of uncompensated work performed, the burden of proof did not shift to NSB, the party that failed to meet the recordkeeping requirements of FLSA. Here, because recordkeeping accuracy was held to be at issue, police officer estimates were held insufficient to prove that uncompensated work was performed. This "solution" is in conflict with this Court's decisions and the decisions of other circuit courts of appeal.

In this case, not only did the trial court allow the jury to consider whether there were recordkeeping violations, despite the undisputed evidence of such violations, the jury was instructed to hold the employee to the requirement to prove uncompensated work with specificity and also show that NSB had suffered or permitted such uncompensated work to be performed. Credible officer estimates and recollections were not entitled to any weight because the jury had ruled that no recordkeeping violations had occurred. Once the NSB was allowed to rely upon its fraudulent time sheets as convincing averages or acceptable substitutes for accurate payroll records, the solution was to penalize the employee and deny him or her any recovery because he or she could not prove the precise extent of uncompensated work.

This Court's review is necessary if only to confirm the integrity of the FLSA. NSB's opinions and assertions notwithstanding, recordkeeping requirements of the FLSA do matter a "blip." This Court's review is required to confirm that merely because it is difficult to maintain accurate records, merely because it was more administratively convenient to falsify time records, merely because NSB did not want to pay overtime does not excuse the recordkeeping requirements of the FLSA.

Otherwise, employers with workers in remote sites -- such as park rangers, Montana State Troopers, and oil riggers on rigs at sea -- can avoid the law.

B. NSB's Flextime Policy Is Illegal As A Matter Of Law Because It Is A Pretend Work Schedule to Avoid Overtime

NSB contends that the FLSA permits a "flexible" work schedule such as its flextime system. In any event, NSB argues, there is nothing in FLSA that specifically prohibits it. Officers will respond to both these legally flawed arguments.

NSB's flextime policy bears not even a passing resemblance to the flexible work schedules or fluctuating work weeks permitted by the case law and the Department of Labor regulations. The fixed salary for a fluctuating work week permitted by federal regulation 29 C.F.R. § 778.114 encompasses an employment contract that guarantees the employee will receive an average hourly wage of at least minimum wage. See *Spires v. Ben Hill County*, 754 F.Supp. 690, 702-704 (M.D. Ga. 1990) where 29 C.F.R. § 778.114 held not to apply since there was no proof of mutual understanding of terms. This is an employment contract or relationship that encompasses a very specific work assignment and specific exception to the wage and hour regulations. The concept anticipates a fixed salary that on a fluctuating work week will always result in the payment of that salary including overtime premium. NSB would be hard pressed to point to any evidence in the record that officers going on and off the clock each hour of the day or night at no set hour is work at a "fluctuating work week" as contemplated by the regulations. Additionally, at no time was any individual officer guaranteed to

receive some fixed salary, including some agreed upon premium pay.

These concepts and exceptions offered by NSB under the federal regulations have no application here and NSB's counsel knows it. It was undisputed by NSB that officers were hourly employees and were not paid a fixed salary. Officers were not paid a salary that included time and a half regardless of the hours worked, and officers were not paid for hours worked in excess of the fluctuating work schedule. Flextime in the traditional sense of a short work week at set number of reduced hours one day followed by set number of increased hours on the next day is the flexibility allowed by the FLSA. NSB's argument that this flexibility somehow sanctions its bastardized sense of flextime is specious.

NSB's argument that there is no specific provision of the FLSA which prohibits its flextime policy is sophistry. This Court has repeatedly condemned violations of the FLSA which involve employer artifices designed to avoid the statutory requirements and minimum overtime compensation requirements of the FLSA. In *Walling v. Helmerich & Payne*, 323 U.S. 37 (1944) this Court condemned as a violation of the FLSA an employer's novel split-day plan of computation of work shifts as an "ingenious mathematical manipulation" which was designed to ensure that total wages paid to an employee would remain the same despite the provisions for overtime in the Act. Id. at 41. The Court found that the arbitrary division of an employee's daily shift or tour of duty into two parts setting one as base rate and the other as overtime was an unrealistic and artificial scheme to negate the statute's purpose. Id. In finding that such an ingenious and creative plan was in violation of the principles of the Act, the Court stated:

> Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Id. at 42. Similarly NSB has used ingenuity and creativity to take avoidance of the overtime provisions of the FLSA to a heretofore unreached plane.

NSB's reliance on *Mullins v. Howard County Maryland*, 730 F.Supp. 667 (D. Md. 1990) for the proposition that the FLSA permits flexible work schedules is misplaced. In *Mullins*, the court was dealing with fixed straight time payments over a period of time, including fixed overtime payments, which resulted in all overtime and straight time hours being paid. Nonetheless the court specifically noted that:

> Under the FLSA, averaging the straight time payments is permissible. The only requirement for straight time payments is that the work period must remain fixed regardless of how many hours of straight time are actually worked. See e.g. 29 C.F.R. § 553.224 (1989). (emphasis added).

Id. at 670. Even NSB would acknowledge that its officers had no fixed work period.

The regulations contemplate a flextime schedule which contains a later or earlier start time which meets an employee's personal or educational demands outside the work place. Instead, NSB set no fixed work schedule other than three hours during five days out of any single week. Other than those 15 hours, there was no "tour of duty," there was no scheduled work. Officers were ordered to stretch the remaining 35 hours of a 40-hour

work week over 24-hour days, 7-days a week. Work performed late at night for 5 or 6 hours was to be traded out in 15 minute, 20 minute, 40 minute or hour intervals of undisclosed and unrecorded "quiet time" occurring at indefinite and unknown times during whatever time remained in the work week.

The NSB system offset hours that might have been normal work hours with hours of undesirable work time with no attempt on the part of NSB to track or record when such hours of work were accomplished. The whole purpose of this scheme was to obtain 24-hour law enforcement presence in villages without being faced with the budgetary realities of paying overtime for such police coverage. As such, NSB is being disingenuous with this Court by contending that this "stretch time" policy of NSB was merely a specific fact issue involving flexible work schedules otherwise permissible under the FLSA.

C. The Questions Raised In This Case Go Beyond The Interest Of Only The Parties

NSB quotes out of context the police officers' characterization of NSB's stretch time work policy as a "novel and unique" payroll system. It is only within the context of the traditional notions of a flextime work schedule, which are supposed to benefit a worker's personal and educational demands, that the NSB's flextime policy is novel and unique.

In one very important sense, NSB's policy is neither unique nor novel. NSB is currently using its flextime policy to employ its current compliment of public safety officers in villages on reduced staffing requirements of one or at most two officers in a village. It still wants 24 hour police coverage with little or no overtime accrued

by these officers. Moreover, NSB is one of the larger public employers in the State of Alaska employing one of the largest work forces. NSB, in its opposition to review, is unabashed in its confidence in the use of its peculiar flextime work schedules for its officers or arguably for any of its other service delivery employees in these remote villages. With the sanction of the federal courts, NSB's flextime policy will be a model for delivery of police and other public services to remote and rural communities in Alaska or any other state with vast open spaces.

Finally, as long as NSB feels confident in the use of its flextime policy to stretch officer time in remote villages, NSB will not hire additional officers to provide the law enforcement protection and 24-hour coverage that village residents of the NSB have come to expect and deserve. NSB will simply replenish burned out officers (as it did with the seventeen officers involved in the lawsuit) with new recruits and the NSB flextime system will continue unchanged. Only review by this Court will convince both the elected officials and the Director Department of Public Safety that it is necessary to provide enough officers to village assignments as the only legitimate alternative to paying overtime. This is precisely the purpose of the FLSA -- a purpose that was frustrated and violated at trial in this case.

CONCLUSION

Each officer estimated his or her actual hours of uncompensated overtime, assuming that flextime did not offset those hours worked during alleged quiet times in the normal 8 - 5 day. Petitioning officers estimated their hours of uncompensated overtime at trial with a specific

total number of hours. Under *Mt. Clemens*, this proof was sufficient to meet each officer's minimal burden to shift to NSB the duty to come forward with evidence of precise hours worked. NSB did not even attempt such proof but instead attacked the unreasonableness of the officers failure to live and work by its flextime procedures. This Court should reverse and remand for an order entering judgment for each of these officers at the amount of each one's estimated overtime hours.

DATED this 1st day of November, 1994.

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Code of Federal Regulations

29 C.F.R. § 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these week sis approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.62).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short

ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he received for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.